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8 [Additional counsel on signature page]

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 JEFF YOUNG, on behalf of himself and all  
14 others similarly situated,

15 Plaintiff,

16 vs.

17 Cree, Inc.,

18 Defendant.

19 Case No: 4:17-cv-06252-YGR

20 **PLAINTIFF'S MOTION TO STRIKE  
REPORT AND EXCLUDE OPINIONS OF  
MR. JESSE DAVID**

21 Date: May 28, 2019

Time: 2:00 p.m.

Place: Courtroom 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

Compl. Filed: October 27, 2017

Trial Date: N/A

1     **I. INTRODUCTION**

2         Plaintiff moves to strike the entire expert report of Mr. Jesse David, retained by Defendant  
 3 Cree, Inc. (hereinafter “Cree”). After he submitted his report and was deposed, Cree and Mr. David  
 4 improperly produced new documents upon which Mr. David relied to complete his report. Plaintiff’s  
 5 experts have not had time to review or analyze the newly produced materials. As this Court is aware,  
 6 all disclosures must be made “at the times and in the sequence that the court orders.” Fed. R. Civ. P.  
 7 26(a)(2)(D). As a result of the prejudice to Plaintiff, Mr. David’s report should be stricken or, in the  
 8 alternative, any opinions which he made based on the new documents should be stricken.

9     **II. RELEVANT FACTUAL HISTORY**

10         Mr. David submitted his thirty-one-page expert report on March 22, 2019. *See* Dkt. No. 87,  
 11 Ex. 6 (hereinafter “Report”). Mr. David was deposed about his Report on April 16, 2019. Dr. David  
 12 testified that he relied upon all of the documents listed in his Report to form his conclusions,  
 13 particularly as they relate to Dr. David’s opinions as to Cree’s business and marketing plans.  
 14 Declaration of S. Clinton Woods (hereinafter “Woods Decl.”), at Ex. 1 (“David Dep.”) at 87:20-88:24.  
 15 However, after the deposition, on April 19, counsel for Plaintiff requested clarification on several  
 16 documents listed in the Report, which had not been produced and were outside the bates ranges  
 17 previously produced by Defendant and requested all documents listed in the Report be produced  
 18 immediately. Woods Decl. at ¶ 4. Counsel for Cree did not respond meaningfully until a week later,  
 19 on April 26, 2019, confirming that there were, in fact, additional and new documents to produce.  
 20 Woods Decl. at ¶ 5. When counsel for Cree “produced” these documents, they did so late in the day  
 21 on Friday April 26, and sent them only to one of Plaintiff’s counsel whom they knew was out of the  
 22 office for an extended period. *Id.* at ¶ 6. Nevertheless, Cree produced nearly four hundred pages of  
 23 new documents, bates stamped CREE\_00072983-CREE\_00073321, as well as several thousand  
 24 documents which Dr. David had relied upon but were mislabeled. *Id.* at ¶ 7.

25         Despite promises to supplement Dr. David’s report with accurate information as to the  
 26 documents he relied upon to submit his report, as of the filing of this motion, Cree has not yet done  
 27 so. *Id.* at ¶ 8. The documents are complex in nature and contain Cree financials, strategy, market

1 analysis and SKU information and Plaintiff was not given a meaningful opportunity to analyze them  
 2 in the context of Dr. David's report. *Id.* at ¶ 9.

### 3 III. LEGAL STANDARD

4 Federal Rule of Civil Procedure 26(a)(2)(A) and (B) provides that “a party must disclose to  
 5 the other parties the identity of any witness it may use at trial to present evidence under Federal Rule  
 6 of Evidence 702, 703, or 705,” and such disclosure “must be accompanied by a written report—  
 7 prepared and signed by the witness—if the witness is one retained or specially employed to provide  
 8 expert testimony in the case or one whose duties as the party's employee regularly involve giving  
 9 expert testimony.” The expert's report must contain *inter alia* “the facts or data considered by the  
 10 witness in forming” his opinions. Fed. R. Civ. P. 26(a)(2)(B).

11 The disclosures must be made “at the times and in the sequence that the court orders.” Fed. R.  
 12 Civ. P. 26(a)(2)(D). If a party fails to provide such disclosures as required under Rule 26(a), “the  
 13 party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or  
 14 at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). As an  
 15 additional sanction, the court may “order payment of the reasonable expenses, including attorney's  
 16 fees, caused by the failure.” Fed. R. Civ. P. 37(c)(1)(A).

### 17 IV. ARGUMENT

18 Plaintiff has been prejudiced because he was not able to properly investigate or question the  
 19 new documents. Cree did not disclose salient facts and documents in a timely fashion. The documents  
 20 Cree has produced late are complex and are germane to Mr. David's opinions because he testified that  
 21 he relied upon them in formulating the report.

22 Further, Plaintiff's experts have not had time to review or analyze the newly produced  
 23 materials. *See e.g., Jackson Family Wines, Inc. v. Diageo N. Am., Inc.*, No. 11-5639 EMC (JSC), 2013  
 24 WL 5913749, at \*2 (N.D. Cal. Oct. 31, 2013) (Allowing plaintiffs to reconvene defendant's expert's  
 25 deposition and requiring defendant to pay for two hours of plaintiff's counsel's time where defendant  
 26 failed to timely disclose facts and data the expert relied on, but declining to strike the defendant's  
 27 expert's testimony.); *Fujitsu Ltd. v. Belkin Int'l, Inc.*, No. 10-cv-03972-LHK, 2012 WL 6096664, at  
 28 \*2–3 (N.D. Cal. Dec. 7, 2012) (striking expert reliance data disclosed in a supplemental report because

1 it should have been disclosed with the expert's affirmative report); *Occidental Research Corp., a*  
 2 *California corporation; et al., v. Curtis Tamkin, et al.*, No. 17-4621-R, 2018 WL 6333687, at \*1 (C.D.  
 3 Cal. Aug. 30, 2018) (Granting motion *in limine* to preclude invoices and related testimony from trial  
 4 because they were produced almost a month after the close of discovery and plaintiffs claimed to have  
 5 been seriously prejudiced by this late disclosure, as plaintiff's expert witness was unable to review  
 6 the documents before issuing his expert report or sitting for his deposition. Defendant failed to  
 7 demonstrate that the failure to comply with discovery obligations was substantially justified or  
 8 harmless.); *Belch v. Las Vegas Metro. Police Dep't*, No. 2:10-CV-00201-GMN, 2012 WL 845883, at  
 9 \*3 (D. Nev. Mar. 13, 2012) (Defendants suffered prejudice after plaintiff failed to provide timely  
 10 disclosures associated with expert report; because plaintiff did not provide a substantial justification  
 11 for the untimely and incomplete disclosures, the court granted the motion to strike plaintiff's expert's  
 12 report and precluded plaintiff from utilizing the expert's opinion. Plaintiff was ordered to pay  
 13 reasonable expenses, including attorney's fees, as a sanction.); *Qualcomm Inc. v. Apple, Inc.*, No.  
 14 17CV1375-DMS-MDD, 2019 WL 92570, at \*3 (S.D. Cal. Jan. 3, 2019) (striking portions rebuttal  
 15 expert report that relied on documents that were not timely disclosed).

16 Here, Cree plainly failed to timely produce documents and information regarding the materials  
 17 Mr. David relied upon. When they were asked to produce such materials, they did so in a manner  
 18 guaranteed to frustrate Plaintiff's efforts to review and analyze the documents prior to their own  
 19 upcoming filing date. Cree's gamesmanship should not be rewarded, and Dr. David's report should be  
 20 stricken, or, in the alternative, the Court should strike any opinions expressed which rely on untimely  
 21 produced documents.

## 22 V. CONCLUSION

23 Plaintiffs request that Mr. David's report be stricken in its entirely or in the alternative  
 24 strike any opinions which Mr. David made based on the new documents.

25 Dated: May 3, 2019

By: /s/ S. Clinton Woods

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